

**Pursuant to Ind. Appellate Rule 65(D),
this Memorandum Decision shall not be
regarded as precedent or cited before
any court except for the purpose of
establishing the defense of res judicata,
collateral estoppel, or the law of the case.**

ATTORNEY FOR APPELLANT:

BRUCE E. ANDIS
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General Of Indiana

MATTHEW D. FISHER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

TAMARA LEWIS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)

No. 49A02-0603-CR-191

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Scott DeVries, Commissioner
Cause No. 49F18-0510-FD-179095

December 11, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Tamara Lewis entered a plea of guilty to battery on a law enforcement officer resulting in injury, a Class D felony, and was sentenced to two years. At sentencing, Lewis offered as a mitigating factor the undue hardship a longer incarceration would cause on her two small children. Lewis appeals her sentence, contending that the trial court abused its discretion in failing to take undue hardship on her dependents into consideration when imposing a sentence six months beyond the advisory sentence. Holding that the trial court did not abuse its discretion in failing to find Lewis' proffered mitigator, we affirm.

Facts and Procedural History

On October 16, 2005, Tamara Lewis was involved in a fight with her mother, Kay Lewis. Indianapolis Police Officers Ted Sadownik and Billy Carruthers were dispatched to investigate a report of the fight. Upon arriving at the scene, the officers saw that Kay had been injured and attempted to arrest Lewis. Lewis struggled with and injured Officer Sadownik. Because of this altercation, Lewis was charged with: battery on a law enforcement officer resulting in injury, a Class D felony; resisting law enforcement, a Class D felony; and battery, a Class A misdemeanor.

Lewis entered into a plea agreement with the State pursuant to which she pleaded guilty to battery on a law enforcement officer in return for the State agreeing to dismiss the other charges and cap the sentence at 730 days. The trial court accepted Lewis' guilty plea. After accepting the guilty plea, the court heard testimony from Lewis' sister, Tanisha Lewis, that she would take responsibility for Lewis' two young children even though she had three

children of her own. Tanisha testified that although it would not be easy taking care of Lewis' children, it would not be a burden.

On February 9, 2006, a sentencing hearing was held. The trial court found as aggravating factors Lewis' prior criminal convictions, including two previous battery convictions, and her unwillingness to take advantage of previous rehabilitation programs. The trial court found her acceptance of responsibility to be a mitigating factor. The trial court did not mention undue hardship on Lewis' two children. Finding that a sentence above the advisory sentence was supported because the aggravators outweighed the mitigating factors, the trial court sentenced Lewis to a total of 730 days, with the first 365 days to be served at the Department of Correction, followed by 180 days of Community Corrections Work Release and 185 days of probation. Lewis was also found to have violated her probation in an unrelated case and was sentenced to serve 270 days of home detention consecutive to her battery sentence.

Discussion and Decision

Lewis contends that in addition to the mitigating circumstance the trial court did find, it also should have found as a mitigating circumstance that incarceration would impose an undue hardship on her two small children, and thereby abused its discretion in imposing a sentence greater than the advisory sentence.¹

¹ Although Lewis states her issue as whether her "sentence is inappropriate in light of the nature of her offenses and her character," Brief of Appellant at 5, she does not actually make an inappropriate sentence argument. She never addresses the nature of her offense or her character, and does not request that this court use its power pursuant to Indiana Appellate Rule 7(B) to revise her sentence, instead focusing on the mitigating factor the trial court allegedly omitted and requesting that we remand to the trial court for re-

I. Standard of Review

Sentencing lies within the discretion of the trial court. Davis v. State, 851 N.E.2d 1264, 1267 (Ind. Ct. App. 2006), trans. denied. We review sentencing decisions for an abuse of discretion. Id. A trial court's decision is an abuse of discretion if it is clearly against the logic and effect of the facts and circumstances before the court. Henderson v. State, 848 N.E.2d 341, 344 (Ind. Ct. App. 2006).

II. Failure to Find Hardship Mitigator

We note first that Lewis committed this crime on October 16, 2005, and therefore, the sentencing statutes as amended effective April 25, 2005, apply to Lewis. Lewis pled guilty to battery on a law enforcement officer resulting in injury, a Class D felony. Indiana Code section 35-50-2-7(a) states that a person who commits a Class D felony “shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years.”

Indiana's sentencing scheme provides that a trial court may consider certain mitigating circumstances, including that imprisonment will result in undue hardship to the defendant's dependents, in determining what sentence to impose. Ind. Code § 35-38-1-7.1(b)(10). The statute also now states that “[a] court may impose any sentence that is authorized by statute and permissible under Indiana Constitution regardless of the presence or absence of aggravating circumstances or mitigating circumstances.” Ind. Code § 35-38-1-7.1(d). Our supreme court has not yet interpreted this statute; however, the statute's plain language

sentencing. Accordingly, we do not undertake an independent analysis of Lewis' sentence pursuant to

indicates that “a sentencing court is under no obligation to find, consider, or weigh either aggravating or mitigating circumstances.” Fuller v. State, 852 N.E.2d 22, 26 (Ind. Ct. App. 2006), trans. denied. Nonetheless, if a court does find, consider, and balance aggravating and mitigating circumstances, it is under an obligation to do so correctly. Primmer v. State, 2006 WL 3349960 at *5 (Ind. Ct. App., Nov. 20, 2006). If a trial court relies on aggravating or mitigating circumstances in imposing a sentence, it must do the following: (1) identify all significant aggravating and mitigating circumstances; (2) explain why each circumstance is aggravating or mitigating; and (3) articulate the evaluation and balancing of the circumstances. Ind. Code § 35-38-1-3.

Although Lewis proffered the undue hardship on her children as a potential mitigating factor, this factor was not considered by trial court in determining Lewis’ sentence. When a defendant introduces evidence of mitigating factors, it is within the discretion of the trial court to determine whether the factors are mitigating. White v. State, 846 N.E.2d 1026, 1034 (Ind. Ct. App. 2006), trans. denied. The trial court is not required to explain why it does not find the proffered factors to be mitigating. Id. An allegation that the trial court failed to consider a mitigating factor requires the defendant to show that the mitigating evidence is both significant and clearly supported by the record. Burgess v. State, 854 N.E.2d 35, 39 (Ind. Ct. App. 2006). The trial court is not required to find that a defendant’s incarceration would impose undue hardship on dependents. Weaver v. State, 845 N.E.2d 1066, 1074 (Ind. Ct. App. 2006), trans. denied.

The record shows that Lewis has two small children, and no doubt being separated from their mother will be a hardship on them. However, the record also shows that Lewis' sister is willing and able to care for the children and has done so in the past when Lewis was incarcerated. It was reasonable for the trial court to conclude that, given a loving family member to care for the children, this factor was not sufficiently significant to be considered a mitigating factor in determining Lewis' sentence. Moreover, we note that Lewis has not explained how a prison term of two years will impose a greater hardship on her children than a sentence of one and one-half years. See Abel v. State, 773 N.E.2d 276, 280 (Ind. 2002) (holding that the trial court correctly declined to give undue hardship to dependents any mitigating weight because the "difference here between the presumptive or minimum sentence and the enhanced sentence hardly can be argued to impose much, if any, additional hardship on the child") (citation omitted). The trial court was not obligated to find undue hardship to dependents as a mitigating factor, and did not abuse its discretion in sentencing Lewis to an enhanced term.

Conclusion

The trial court did not abuse its discretion in failing to find undue hardship to Lewis' dependents as a mitigating factor in imposing a two-year sentence on Lewis. Lewis' sentence is affirmed.

Affirmed.

SULLIVAN, J., and BARNES, J., concur.